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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC. AS AMICUS CURIAE

WALTER L. STRATTON
DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10020

Attorneys for the American Association of Advertising Agencies, Inc.

DAVID S. VERSFELT
Of Counsel

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INTEREST OF AMICUS CURIAE

The American Association of Advertising Agencies, Inc. ("A.A.A.A."), with consent of all parties, files this brief as *amicus curiae* urging that the judgment of the Court of Appeals of the State of New York be reversed. The decision of the Court of Appeals is of substantial concern to the A.A.A.A. because it upholds an unjustified suppression of constitutionally protected information of value to the public.

The A.A.A.A. is the national association of the advertising agency business. Its members include more than 480 advertising agencies, located throughout the United States, which handle approximately three-fourths of all national advertising placed by advertising agencies, as well as a substantial amount of local retail and public interest advertising.

Advertising agencies are experts in communicating with the public at large. They design advertising campaigns and create, execute and place advertisements on behalf of their clients, who for the most part are businesses, including utilities, engaged in selling goods and services to the public. A substantial number of them are also interested in otherwise informing a wide audience of facts and opinions relevant to current public affairs.

Public utilities across the nation have recently turned to advertising as the best—and perhaps the only—way to obtain a broad forum within which to communicate particular facts and opinions of significance to current issues. However, utilities are not alone in their reliance on public interest advertising: corporations of all kinds increasingly use advertising to describe their functions and activities, to defend themselves against accusations of environmental, economic or other wrongdoing, and to state their views on energy, conservation and other matters of public importance.[1] Indeed, a recent survey indicates that approximately 16 percent of the major United States corporations have undertaken advertising intended to "inform, educate or advocate relative to public issues." *New York Times,* October 18, 1979, at D15.

Whether the advertising promotes goods and services or conveys facts and opinions outside the realm of commerce, it is the agency's job to devise a message that effectively and memorably presents salient information and ideas on behalf of a client, to fashion advertisements that will capture and focus attention on the message, and to place the advertisements in media that will efficiently reach

1. Public interest advertising may also provide additional benefits for corporate advertisers, for it fosters an increased understanding of the advertiser's positions on the part of employees and potential investors.

the desired audiences. Mass audiences are, after all, comprised of many overlapping audiences, segmented by geography, age, sex, education, job, income, marital status, race, language, national origin, religion, politics, leisure activities, and cultural interests. Different kinds of media reach different audiences, or reach the same audience with different efficiency or different impact. Restricting use of a particular medium for certain types of messages might effectively deny non-commercial communication by businesses to some audiences and would assuredly impair the efficiency and vitality of communication of that type of message with many others.

The bill inserts at issue in this case may reach some audiences that other media reach barely or not at all, may reach other audiences with greater efficiency than other media, and may be particularly suited to certain kinds of campaigns or certain kinds of clients. Restricting use of this important technique, even though the ban is directed against only certain users and certain types of messages, will inevitably impair the ability of A.A.A.A. members to communicate with significant audiences on behalf of their clients. If the ban at issue in this appeal spreads to other major states and other types of users, the impact on all A.A.A.A. members would be severe.

The A.A.A.A. opposes a ban on any particular channel of public communication. The constitutional right of free expression is a powerful component of our nation's liberties. It should not lightly be restricted, even in seemingly minor ways.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight

> deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. *United States,* 116 U.S. 616, 635 (1886). The death of one technique for expression in one place, judicially sanctioned, could pave the way for assaults on other media in many places.

QUESTION PRESENTED

This brief will address the question whether an order of the New York State Public Service Commission which prohibits New York utilities from communicating their views on "controversial matters of public policy" by means of bill inserts to their customers can stand or must be stricken as a denial of rights protected by the First Amendment.

SUMMARY OF ARGUMENT

The argument to be presented consists of two parts:

(1) The communications prohibited by the Order of the Public Service Commission—utility customer bill inserts containing expressions on "controversial matters of public policy"—are entitled to the full constitutional protection afforded by the First Amendment.

(2) The interests asserted by the Public Service Commission are insufficient to justify the insert ban's suppression of protected expression.

I.

THE UTILITY BILL INSERTS PROHIBITED BY THE PUBLIC SERVICE COMMISSION ARE ENTITLED TO FULL CONSTITUTIONAL PROTECTION.

Bill inserts of the type banned by the Public Service Commission are an advertising medium. They convey messages, often prepared by an advertising agency, from an advertiser to the public. For the most part, bill inserts are "commercial" in nature, informing consumers of the quality and availability of goods and services. However, an increasing number of bill inserts contain messages which are non-commercial, and it is non-commercial messages on controversial issues of public policy by Consolidated Edison Company which are banned by the Public Service Commission's proscription. When the Commission's Order is examined in light of established principles of constitutional law, there can be no doubt that the ban curtails protected free expression.

At the heart of the First Amendment is the fundamental relationship between the free flow of information and a self-governing people. Our democracy is grounded upon the conviction that wise policies are most likely to prevail in public affairs when a broad range of ideas and opinions are disseminated for consideration by the citizenry. This Court has declared that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), *quoted in First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 n.12 (1978). Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966), and the mandate of the Amendment is that

governmental bodies may not proscribe the form or content of individual expression. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

However, communication does not take place without a receiver as well as a sender. The right of all to speak freely implies an equal right on the part of the public to hear those who would speak. The freedom to learn, to be fully informed on matters of interest, is as precious an inheritance as the freedom to tell. Therefore, the guarantees of the First Amendment reach beyond the individual speaker to encompass, as well, the recipient of the communication. As this Court summarized recently in a case which invalidated as unconstitutional a Virginia statute prohibiting the advertising of prices of prescription drugs, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 (1976). *See Red Lion Broadcasting Company* v. *FCC,* 395 U.S. 367, 390 (1969); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); *Martin* v. *Struthers,* 319 U.S. 141, 149 (1943).

While the persuasive aspect of commercial advertising may be of particular value to sellers of goods or services, the informational content may nonetheless be significant to consumers, whose knowledge of product availability would be restricted in the absence of advertising. Of possibly greater significance to consumers and citizens, however, is advertising relating to issues of public importance, for which intelligent and well-informed judgments are needed. The public's understanding varies with the quantity and quality of its information. This Court's decisions involving corporations which have undertaken to communicate with a segment of the public are appropriately based:

> not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.

First National Bank of Boston v. *Bellotti,* 435 U.S. 765, 783 (1978) (footnote omitted) (citing cases). Suppression of advertising directed to issues of public significance cannot be achieved without suppressing informational content, thereby impermissibly curtailing the consumer/citizen's right to know.

Any contention that corporate advertising relating to issues of public policy is not a protected form of speech has been entirely swept away in recent years by a series of decisions of this Court. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). It is now well settled that the inherent informational value of speech does not depend upon the identity of its source, be it corporation, association, individual, or public utility. *Id.*

Moreover, the fact that Consolidated Edison Company is subject to the regulatory authority of the Public Service Commission cannot diminish the protections of the First Amendment. For example, the pharmacists in the *Virginia Pharmacy* case were licensed by the state and subject to what this Court characterized as "extensive regulation," 425 U.S. at 750-51, yet a statutory restriction on their right to advertise was nonetheless struck down because it violated protected expression. Similarly, in the *Bel-*

lotti case, a state statute forbidding expenditures by corporations, including regulated utilities, to influence votes on policy referenda was invalidated because it abridged expression that the First Amendment was meant to protect. 435 U.S. at 776. The statute was not saved by the fact that utilities happen to be regulated in areas unrelated to free expression.

Nor does the possibility that some recipients of a utility bill insert might find its message controversial or even moderately offensive divest it of constitutional protection. To the contrary:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

Street v. *New York,* 394 U.S. 576, 592 (1969). Indeed, if a speaker's opinion might give offense or stir controversy, there is an even greater need to shelter the expression in order to protect and promote diversity, intellectual stimulation, and challenges to prejudice and preconceived notions. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. at 777 n.12 & 781-82; *Cohen* v. *California,* 403 U.S. 5, 23-26 (1971); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949).

Furthermore, First Amendment protections are not limited to traditional forms of the spoken or printed word, but extend as well to "constantly proliferating new and ingenious forms of expression." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210 (1975). Freedom of speech is not simply a matter of the right to distribute pamphlets printed on a hand press after working hours. New methods of advertising have become essential to public expression of a wide spectrum of ideas and opinions by

both business and private citizens. The Constitution necessarily encompasses practicable means of conveying facts and ideas to an audience of thousands, even millions. *Id.: Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938).

The bill inserts proscribed by the Public Service Commission are an important means of gaining access to a mass audience. As such, they are unquestionably a valuable technique for the dissemination of information and opinion to the public. Without doubt, they are entitled to the full protections of the First Amendment.

II.

THE INTERESTS ASSERTED BY THE PUBLIC SERVICE COMMISSION ARE INSUFFICIENT TO JUSTIFY THE SUPPRESSION OF SPEECH RESULTING FROM THE BAN.

The constitutionality of the Public Service Commission's ban of bill inserts relating to public policy issues rests upon whether the justifications offered in its support can survive "the critical scrutiny demanded under accepted First Amendment . . . principles." *Buckley* v. *Valeo,* 424 U.S. 1, 11 (1976). In an earlier case, while striking a state requirement that public school children salute the flag, the Court suggested a prophetic example:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

West Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 639 (1943). *Accord, First National Bank of Boston* v. *Bellotti,* 435 U.S. at 786; *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *Bates* v. *City of Little Rock,* 361 U.S. 516, 524 (1960). Appropriate scrutiny of the Public Service Commission's Order reveals a lack of sufficient state interests to justify the ban of certain bill inserts. The Court of Appeals of New York erred in finding otherwise.

A. No Asserted State Interest Justifies The Ban's Content-Based Restriction Of Speech.

The applicability of the Public Service Commission's ban obviously turns on the content of the message, for communications concerning "controversial issues of public policy" are prohibited while messages about other topics are not. In concluding otherwise, the Court of Appeals apparently relied on what it characterized as the "objective and evenhanded manner" of the ban. 47 N.Y. 2d 94, 107; 417 N.Y.S. 2d 30, 37 (1979). Apparently, the New York Court of Appeals reasoned that, so long as speech on all sides of a particular type of issue is suppressed equally, there can be no violation of the First Amendment.

However, the argument proves too much: the First Amendment obviously will not tolerate sweeping suppressions of speech merely because the restriction might be applied "evenhandedly" to everyone. It is the suppression itself which does violence to the individual and societal interests in free speech, and an unjustified restriction cannot be salvaged by its "objective" application. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. 765; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748.

In approving the ban despite its dependence on the content of bill insert messages, the Court of Appeals relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).[2] 47 N.Y.2d 94, 107; 417 N.Y.S. 2d 30, 37 (1979). But those cases are not on point. The *Greer* case concerned a prohibition of partisan political speeches on a federal military installation. The *Lehman* case concerned the right of a municipality to refuse space on a city rapid transit system for campaign advertising by a political candidate. In both cases, this Court held that the restrictions did not violate the rights of those seeking to express themselves. In neither case, however, did the restriction discriminate among differing viewpoints within the same subject matter. Here, in contrast, the Public Service Commission has prohibited bill inserts as a mechanism for the dissemination of the *utility's viewpoint* on controversial issues. Moreover, both *Greer* and *Lehman* involved federal or municipal property and resultant concerns about the appearance of governmental entanglement with partisan political activities. In contrast, the insert ban at issue in this case presents no similar factors.

Given that the Commission's ban acts to suppress communications with certain characteristics only when expressed by utilities, the Court of Appeals' assertion of non-discriminatory application sounds hollow indeed.

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2. The Court of Appeals also referred to *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), but that case offers no support for—indeed, it contradicts—the reasoning of the Court of Appeals. *Erznoznik* concerned a local ordinance which punished, as a public nuisance, any film exhibition of nudity by drive-in theaters if the screens were visible from a public street. This Court held the ordinance invalid on its face as a violation of free speech precisely *because* it censored movies solely on the basis of their content without sufficient justification.

B. No Asserted State Interest Justifies The Ban As A Mere Time, Place Or Manner Restriction.

The bill inserts which give rise to this case are an important means of corporate communication for several reasons. First, as a vivid and direct form of communication, they can attract the attention of responsible individuals capable of benefitting from serious information about complicated subjects. Second, they are effective in reaching their intended audience, utility customers. Third, their per recipient cost is very low given that they can be simply included in a billing package that is to be mailed in any event.

1. The State's Interest In Protecting The Sensibilities Of Utility Customers Cannot Justify The Ban.

The record in this case, containing a mere handful of complaints from among millions of utility customers about bill insert materials, *see* R. 139-50, does not provide a justification for the Public Service Commission's proscription. Moreover, there is no reason in logic to assume that the receipt of bill inserts containing "controversial" statements by utilities is any more "offensive" than the receipt of viewpoints of utilities—or others—by other means.

To the contrary, bill inserts are a relatively unobtrusive means of communication. They involve no disconcerting ringing of the telephone, nor any intrusive door-to-door canvassing. They can be contemplated at a time of the recipient's own choosing, at his or her pace, and in whatever surroundings he or she desires. Significantly, unwanted bill inserts can be easily disposed of after no more than a cursory review. Indeed, the trivial task of disposing of unwanted inserts suggests that in this case, as in *Cohen* v. *California,* 403 U.S. 15, 21 (1971), and *Erznoznik*

v. *City of Jacksonville,* 422 U.S. at 211, the burden should properly fall "upon the [recipient] to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"

In finding a justification for the ban in an asserted need to protect the sensibilities of utility customers, the Court of Appeals relied on *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), and *Martin* v. *Struthers,* 319 U.S. 141 (1943). Rather than offering support for the Commission's ban, however, those cases emphasize that the decision whether to receive and consider a particular communication is a judgment best left to the homeowner, not the state. In *Rowan,* a statute permitting householders to require mail advertisers to halt delivery of advertisements which the addressee believed to be sexually provocative was upheld against a First Amendment challenge. Unlike the Commission's ban, however, the statute in *Rowan* permitted the potential recipient, not the government, to make the decision to halt the deliveries and did not prevent those wishing to receive the communications from doing so. 397 U.S. at 737. Similarly, this Court in the *Struthers* case invalidated an ordinance banning door-to-door distributions because the law substituted the judgment of the government for that of the affected individual. 319 U.S. at 143-44.

This Court's statement in *Cohen* v. *California* is particularly instructive:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that *substantial privacy interests* are being invaded in an *essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. *California,* 403 U.S. at 21 (emphasis added), *quoted in Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209-10. Quite clearly, the Court of Appeals erred in finding that a purported need to protect the sensibilities of utility customers justifies the Commission's ban.

2. The Ban Does Not Allow "Ample Alternative Channels" For Communications By Utilities.

To satisfy the requirements of the First Amendment, governmental restrictions on the time, place and manner of expression must allow "ample alternative channels" for communication of the information being restricted. *Virginia State Board of Pharmacy* v. *Virginia Consumers Council, Inc.,* 425 U.S. at 771, *quoted in Friedman* v. *Rogers,* 440 U.S. 1, 9 (1979), *and Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977). The Commission's ban on bill inserts does not provide "ample alternative channels" for communication of messages on controversial issues of public policy.

It is insufficient for the Commission to argue that its restriction of speech provides for alternative channels for communication simply because the insert ban applies to only one technique for expression. *See Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 94; *Grayned* v. *City of Rockford,* 408 U.S. 104, 118-19 n.40 (1972). Indisputably, however, other techniques for communicating the messages of New York utilities will be more expensive than bill inserts, *see* 47 N.Y.2d at 106, 417 N.Y.S.2d at 36, and in all likelihood will be less effective in conveying the total content—emotive, declarative and persuasive—of the messages. The Commission itself characterized the medium of bill inserts as "unique." Statement of Policy on Advertising and Promotional Practices of Public Utilities, Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977, 17 N.Y. P.S.C. 17-R, 19-R (1977).

CONCLUSION

In our pluralistic society with its developing forms and means of expression, it is vital to accord a full scope to the constitutional guarantees of the First Amendment. The Public Service Commission's ban restricts the "free flow of truthful information," *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 95, by proscribing one particular technique for communicating specific messages of the greatest significance to the public as consumers and citizens. The interests invoked by the Commission to justify such a ban pale when compared to the rights to free expression infringed by the Commission's Order. The decision of the Court of Appeals of New York upholding the Order was therefore improper.

Accordingly, for the reasons set forth above the decision of the Court of Appeals of New York should be reversed.

Respectfully submitted,

WALTER L. STRATTON
DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10020
Attorneys for the American Association of Advertising Agencies, Inc.

DAVID S. VERSFELT
Of Counsel

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